(1)

Supreme Court, U.S.

No. 041234 MAR 11 2005

In The

Supreme Court of the United States

Renee S. Thurlow,

Petitioner,

v.

United States of America, et al.

Respondents.

On Petition For Writ of Certiorari
To The United States Court Of Appeals For The Sixth Circuit

PETITION FOR WRIT OF CERTIORARI

Renee S. Thurlow
Petitioner pro se
53075 Barberry Circle
Chesterfield, MI 48051
(586) 749-4942

QUESTIONS PRESENTED FOR REVIEW

I. Whether Petitioner's case presents a federal question challenge against the constitutionality of the "***incident to service***" holding under the provisions of the ***Feres*** doctrine, ***Feres v. United States***, 340 U.S. 135 (1950), wherein "***gross/criminal***" negligent acts and omissions of federal employees cannot be exempted under the ***Federal Tort Claims Act (FTCA)***, 28 U.S.C. 1346 et seq., based upon any of the rationale for the ***Feres*** doctrine to remain the law of the land?

II. Whether the doctrine established under the ***Feres*** Court's "***incident to service***" holding, has unlawfully obstructed Petitioner's ***First Amendment*** Right under ***The United States Constitution*** and statutory right under the ***FTCA*** to petition the federal courts to redress the wrongful death of her son, Marine Corps Recruit Justin Haase, arising from Respondent's "***gross/criminal***" negligent acts or omissions?

III. Whether the good faith intent of the ***Feres*** doctrine's "***incident to service***" bar under the ***FTCA*** established primarily to maintain "good order and discipline" in the military, has been so manipulated and misinterpreted over the past 54 years, barring even criminal acts or omissions from redress under the ***FTCA,*** such as the wrongful death of Justin Haase, compels this Court to overturn or reform the ***Feres*** doctrine to restore integrity within the federal courts?

IV. Whether the Federal District Court's strong reluctance to dismiss the Complaint for lack of subject matter jurisdiction under the provisions of the ***FTCA***, based

the egregious facts and circumstances surrounding Justin's death, demands this Court to revisit the constitutionality and purpose of the ***Feres*** doctrine?

V. Whether Petitioner's wrongful death claim must be remanded to the District Court to establish new precedent and subject matter jurisdiction to address "***gross/criminal***" negligence under the provisions of the ***FTCA***, to prevent unnecessary injuries or death arising from medical malpractice outside the scope of combat and to restore "checks and balances" on power in the United States Armed Forces?

VI. If this Court is unwilling to remedy the ***Feres*** doctrine injustice, as the Guardian of ***The United States Constitution*** and in the name of justice, is this Court obligated to compel the United States Armed Forces to provide Recruits "***informed consent***" or the "***right to know***" the ***Feres*** doctrine strips and prohibits them from equal protection of the ***American Constitution*** once they assume their military oaths?

VII. If this Court denies issuance of writ of certiorari in this case based upon Respondent, United States of America's sovereign immunity status, is there any final United States authority Petitioner should address before seeking to hold "individual" Respondents accountable for the wrongful death of her son, Justin, at the United Nations (UN), Organization of American States (OAS), or International Criminal Court (ICC)?

LIST OF PARTIES

The list of parties to this proceeding arising from the final decision before the Sixth Circuit Court of Appeals include the following:

a. Petitioner Renee S. Thurlow, Personal Representative of the Estate of Justin Haase, deceased; and

b. Respondents The United States of America, The Department of the Navy, Sergeant William R. Bilenski, Sergeant Dwayne A. Hardwick, Hospitalman Sean O. Audain, and Lieutenant Commander Lloyd D. Weddington.

No Corporate disclosure statement under Rule 29.6 is necessary as Petitioner is a private Citizen of the United States of America proceeding pro se.

BASIS FOR JURISDICTION

Petitioner believes ***The United States Constitution*** and its ***First Amendment*** confers jurisdiction upon this Court to review this petition for writ of certiorari in addition to 28 U.S.C. § 1254(1), arising from a final judgment of the United States Court of Appeals for the Sixth Circuit filed on December 13, 2004.

Petitioner believes this case presents a federal question challenge against the judicially created ***Feres*** doctrine, ***Feres v. United States***, 340 U.S. 135 (1950), and is of such imperative public importance as to justify this Court's issuance of writ of certiorari.

STATEMENT OF THE CASE

This case arises from a final judgment of the United States Court of Appeals for the Sixth Circuit filed on December 13, 2004. Petitioner affirmatively asserts the judicially created ***Feres*** doctrine established in ***Feres v. United States***, 340 U.S. 135 (1950), on December 4, 1950, and its "***incident to service***" holding, has denied her equal protection and justice under ***The United States Constitution*** and ***The Federal Tort Claims Act (FTCA), 28 U.S.C. 1346 et seq.***, to redress the wrongful death of her son, Marine Corps Recruit Justin Haase. Petitioner asks this Court to declare the "***incident to service***" bar on judicial redress of "***gross/criminal***" negligent acts or omissions of federal government employees resulting in injury or death to a service member unconstitutional.

On August 24, 2001, Petitioner's son Justin enlisted in the United States Marine Corps (USMC) delayed entry program. On September 11, 2001, (9/11), after learning of the infamous attacks against the United States of America, Justin immediately proceeded to the USMC recruiting office to expedite his processing onto Initial Active Duty for Training (IADT). On October 29, 2001, Justin reported for IADT to USMC basic training to fight for his Country in what we now know as the Global War on International Terrorism ("War on Terror") having *no* knowledge he was stripped of all inalienable protections of ***The United States Constitution*** due to the "***incident to service***" bar under the provisions of the ***Feres*** doctrine's grant of sovereign immunity. Hence, Petitioner filed her Complaint to assert these facts, in addition to the fact the ***Feres*** doctrine removes "checks and balances" on power in the United States military, is the direct and proximate cause giving rise to Justin's wrongful death on December 23, 2001.

Unfortunately, Petitioner's Complaint was dismissed on December 13, 2004 by the Sixth Circuit Court of Appeals based upon the shocking decision she had no "subject matter jurisdiction" under the ***FTCA*** to petition the United States Government for redress of her son's wrongful death under the ***First Amendment*** of ***The United States Constitution***. This fact in of itself warrants the ***Feres*** doctrine to be declared unconstitutional. Nevertheless, Petitioner's case brings new federal question challenges for this Court to revisit the ***Feres*** doctrine to establish new case law to ensure "***gross/criminal***" negligent acts or omissions of federal employees arising "***incident to service***" in the military and leading to unnecessary injury or death of American service members, *cannot* be dismissed under a "doctrine" that is justified by false assertions its rationale barring such claims as Petitioner's under the ***FTCA*** is both good for American national security and for the preservation of good order and discipline in the United States Armed Forces.[1]

In sum, Petitioner brings this case before this Court and affirmatively asserts her right to equal justice under law and protection of ***The United States Constitution*** and ***FTCA*** to redress Justins's wrongful death arising incident to military service has been illegally obstructed by the ***Feres*** doctrine.

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[1] Petitioner does not challenge the ***FTCA's*** exemption for injuries or death arising "incident to combat" nor does she seek to open the courthouse doors for claims of "negligence" per se, arising incident to military service. Petitioner's Complaint was filed to address the "***gross/criminal***" negligent acts and omissions of Respondents leading to Justin's egregious and horrific death. Petitioner seeks to restore "individual accountability" and **not** to disrupt good order and discipline in the United States Armed Forces. The death of Petitioner's son in no way can be denied redress in the federals court's based upon the ***Feres*** doctrine rationales.

This "doctrine" has been so grossly manipulated over the past 54 years since its induction as the law of the land, it is simply a damage control tool to silence and cover up human and constitutional right abuses within the military's command, legal and medical systems to conceal blatant criminal acts and obstruction of justice without the call for accountability. This is contrary to the preservation of national security and good order and discipline in the military, thus supporting Petitioner's request for the ***Feres*** doctrine's "***incident to service***" bar on "***gross/criminal***" negligent acts to be overturned. Petitioner reasonably believes, if the Respondents knew their acts and inactions would be actionable under the provisions of the ***FTCA***, her son might be alive today.

In essence, the ***Feres*** doctrine's absolute bar under the ***FTCA*** within the federal courts' and its failure to ensure "checks and balances" on military power, breeds human and constitutional rights abuses having no legitimate military purpose or necessity. This must end and it is apparent from District Court Judge Bernard A. Friedman's reluctance to dismiss the Complaint based upon lack of subject matter jurisdiction carries great weight for this Court to revisit and the constitutionality of the ***Feres*** doctrine's "***incident to service***" bar under the ***FTCA***, to prevent "***gross/criminal***" negligent acts or omissions from injuring or killing American service members in the future.

Petitioner deserves writ of certiorari in this case to be granted.

Concise Argument In Support Of
Petitioner's Questions Presented For Review

Petitioner believes the facts and circumstances leading to her son Justin's wrongful death present a new federal question challenge against the constitutionality of the judicially created ***Feres*** doctrine, ***Feres v. United States***, 340 U.S. 135 (1950), and its "***incident to service***" bar exemption under ***The Federal Tort Claims Act (FTCA), 28 U.S.C. 1346 et seq.***, and is of such imperative public importance as to justify this Court's issuance of writ of certiorari.

Petitioner affirmatively argues, the 1950 Supreme Court overstepped its constitutional bounds when it created judicial legislation via its "***incident to service***" holding under the ***Feres*** doctrine. Petitioner argues the judicial exemption established via the "***incident to service***" holding was not intended by the United States Congress to dismiss criminal activity resulting in injury or death to service members. Moreover, Petitioner argues the "***incident to service***" holding under the ***Feres*** doctrine directly violates ***The United States Constitution's*** "separation of powers" clause (***U.S. Const. Art. I, sec 8***); her right to petition the Government for redress of her son's wrongful death under the ***First Amendment (U.S. Const. Amend 1)*** and the ***FTCA, 28 U.S.C. 1346 et seq.***, the "supremacy clause" ***(U.S. Const. Art. VI, clause 2).*** For these reasons alone, this Court must declare the ***Feres*** doctrine unconstitutional.

Nevertheless, the injustices of the past of 54 years of ***Feres*** doctrine rule of law cannot be changed nor will it be changed by the United States Congress as it is abundantly clear, they do not intend to remedy the doctrine as this Court well knows, hence, it is now the time for this Court to remedy its own created ***Feres*** doctrine injustice.

Petitioner argues indeed the ***Feres*** Court grossly misinterpreted the ***FTCA's*** Congressional intent by barring service members from absolute recovery. The statement of the Author of the ***FTCA*** itself, namely, Representative Emmanuel Cellar (D-NY) supports this fact. As the facts do show, one year before the ***Feres*** doctrine's "***incident to service***" bar was judicially established, he stated in 1949; he never intended to preclude a suit by a military member when drafting the Act. (emphasis added).[2] Thus, Petitioner asserts, based upon the reasonable person theory in American jurisprudence and combining Congressman Cellar's statement with the compelling dissenting opinion of Justice Scalia re; ***United States v. Johnson***, (1987), that the ***Feres*** doctrine was "***wrongly decided***" and the "***incident to service***" bar under the ***FTCA*** upheld by a slim margin and vote of only a 5-4 bar. A "negligence" claim arising from a (civilian) federal employees acts or omissions, most definitely calls for this Court to address the ***Feres*** doctrine's absolute judicial bar under the ***FTCA*** in this case wherein "***gross/criminal***" negligent acts and omission leading to the "untimely demise" as cited by the Sixth Circuit of Respondents son, cannot be dismissed based upon lack of subject matter jurisdiction. This in of itself is a crime and betrayal of all American service members and their families.[3]

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[2] ***The Military and the Federal Judiciary: an Unexplored Part of the Civil-Military Relations Triangle*** by Michael H. Gilbert.

[3] Petitioner would like to reiterate, her constitutional challenge against the ***Feres*** doctrine is not intended to open the Courthouse doors to suits arising from negligence or incident to combat. However, Petitioner strongly argues, injuries or death arising from "***gross/criminal***" negligent acts or omissions of federal employees cannot be dismissed by the federal judiciary.

In ***United States v. Johnson***, Respondent Johnson did not ask this Court to overrule the ***Feres*** doctrine. Petitioner now does.

In addition to the above arguments wherein Petitioner believes she has made the case the ***Feres*** doctrine was wrongly decided and the ***FTCA*** misinterpreted by the 1950 Supreme Court, Petitioner believes the most compelling statement made in this entire case to merit this Court's issuance of writ, is predicated upon the reluctance of District Court Bernard A. Friedman and his comments: ***"If I had equity jurisdiction, it screams, it screams and screams. It's not fair. There's no question about that."*** (Append. Def. Mot. To Dismiss Proceedings, Wednesday, December 17, 2003, Pg. 3, lines 6-8). In Response, Petitioner's then-attorney, Mr. Lee Wulfmeier stated to the Court: ***"You could start a new precedent today. Instead of Feres we could have Haase, your Honor, a new case."*** (Append. Pg. 5, Lines 12-14). The Court responded: ***"I wish I could. As I say, I took an oath, and the oath was to follow the law."*** (Append. Pg. 5, Lines 15-16).

In sum, Petitioner once again affirmatively argues ***The United States Constitution*** and not the ***Feres*** doctrine is the "law" of the land. It is time for this Court to overturn the "***incident to service***" bar of the ***Feres*** doctrine to all the lower courts to administer justice arising from issues incident to military service that have no bearing on national security or the preservation of good order and discipline based upon the ***Constitution*** and not the ***Feres*** doctrine. Petitioner asserts the ***Feres*** doctrine "obstructs justice" within the federal judiciary and for this reason alone, the doctrine must be declared unconstitutional.

Petitioner argues if the judicially created ***Feres*** doctrine is justified as essential law by the American Government to preserve national security and good order and discipline in

the United States Armed Forces, why then, are military recruits such as her son Justin not being provided "***informed consent***" and the "***right to know***" the ***Feres*** doctrine's prohibits and strips them of equal protection and justice under the very same ***United States Constitution*** they have sworn to protect and serve? Petitioner cannot bring back her son, however, she is asking this Court to do the right thing and remand her case to the District Court to establish the ***Haase*** doctrine to replace the ***Feres*** doctrine to restore "checks and balances" on power in the United States military, while balancing the human and constitutional rights of individual service members and the genuine need to protect national security by limited access to the federal courts arising from cases predicated upon egregious "***gross/criminal***" negligent acts and omissions such as those that led to Petitioner's son's wrongful death.[4]

Petitioner argues the United States Supreme Court "***Feres*** doctrine" decision allows United States federal government employees to engage in human and civil rights abuses in violation of ***The United States Constitution*** and ***International Law*** specifically established at Nuremberg at the conclusion of World War II.

What is most disturbing about the ***Feres*** doctrine decision is the fact that its author, Associate Supreme Court Justice Robert H. Jackson was the Chief Prosecutor appointed by President Harry S. Truman to lead the Nuremberg Tribunal. Thus, Petitioner believes there is no possible way Justice Jackson's ***Feres*** decision could have

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[4]The ***Haase*** doctrine would continue to bar lawsuits arising from negligence or matters arising incident to combat. In addition, the Haase doctrine would provide both "***informed consent***" and a "***right to know***" provisions to inform potential military recruits the actual meaning of the relationship of the "federally distinctive in nature" status between the Government and members of its armed forces.

been intended to dismiss blatant human and constitutional rights abuses under his "***incident to service***" holding which is in contradiction to his prosecuting similar crimes at Nuremberg.[5]

In Conclusion, Petitioner argues ***The United States Constitution*** is the supreme law of the land governing the United States Armed Forces, not the ***Feres*** doctrine. Hence the draconian ***Feres*** doctrine must be abolished or at the very least, reformed.

Petitioner reasonably believes, her constitutional challenge against the ***Feres*** doctrine arising from the wrongful death of her son Justin and predicated upon "***gross/criminal***" wrongful acts and omissions of Respondents provides new federal question challenges for this Court to revisit the constitutionality of the ***Feres*** doctrine. Please issue writ of certiorari.

Respectfully submitted,

Renee S. Thurlow

Renee S. Thurlow
Plaintiff, pro se

Dated: March 10, 2005

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[5] The abomination known as the ***Feres*** doctrine and the crimes arising incident to service leading to wrongful deaths such as Justin's and or injuries of service members arising from the wrongful acts or omissions of federal employees that are being dismissed in the federal courts based upon "lack of subject matter jurisdiction" under ***Feres***, can only be summed up by Justice Robert H. Jackson's own statement at Nuremberg: ***"the wrongs which we seek to condemn and punish have been so calculated, so malignant, and so devastating, that civilization cannot tolerate their being ignored, because it cannot survive their being repeated."***

(2)

Supreme Court, U.S.

041234 MAR 11 2005

OFFICE OF THE CLERK

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Renee S. Thurlow,

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On Petition For Writ of Certiorari
To The United States Court Of Appeals For The Sixth Circuit

APPENDIX

Sixth Circuit Court of Appeals
Judge Nelson
Judge Batchelder
Judge Collier (DJ)

Renee S. Thurlow
Petitioner pro se
53075 Barberry Circle
Chesterfield, MI 48051
(586) 749-4942

APPENDIX

As required by Rule 14.1(i), attached hereto are the relevant District and Appeals Court opinions, orders, findings of fact and conclusions of law entered in conjunction with the December 13, 2004 judgment be sought review by petition to this Court and reproduced verbatim.[1]

[1] There was no Appellate Court transcript produced as the Court did not allow Petitioner according to her previous Counsel of Record oral argument. There are no cited unpublished opinions in the Petition.

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF MICHIGAN
SOUTHERN DISTRICT

RENEE THURLOW, Personal Representative of the Estate of Justin Haase, deceased,

Plaintiff,

-v-

Case Number: 03-72865

UNITED STATES OF AMERICA, THE DEPARTMENT OF THE NAVY, SERGEANT WILLIAM R. BILENSKI, SERGEANT DWAYNE A. HARDWICK, HOSPTIALMAN SEAN O. AUDAIN, and LIEUTENANT COMMANDER LLOYD D. WEDDINGTON,

Defendants.

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DEFENDANT'S (sic) MOTION TO DISMISS
BEFORE THE HONORABLE BERNARD A. FRIEDMAN
United States District Judge
238 U.S. Courthouse & Federal Building
231 Lafayette Boulevard West
Detroit, Michigan 48226
WEDNESDAY, DECEMBER 17TH 2003

APPEARANCES:

For the Plaintiff:	Leroy Wulfmeier, III, Esq.
For the Defendant:	Elizabeth J. Larin, Assistant
Court Reporter:	Joan L. Morgan, CSR Official Court Reporter

DEFENDANT'S (sic) MOTION TO DISMISS
WEDNESDAY, DECEMBER 17TH 2003

Detroit, Michigan
Wednesday, December 17th, 2003

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THE CLERK: Recalling 03-72865, Rene (sic) Thurlow 6 versus United States of America.

THE COURT: May we have appearances, please?

MS. LARIN: Elizabeth Larin, appearing on behalf of the United States.

THE COURT: How are you?

MR. WULFMEIER: Leroy Wulfmeier, your Honor, on behalf of Renee Thurlow.

THE COURT: How are you?

MR. WULFMEIER: Good.

MR. COURT: Okay. This is Defendant's (sic) Motion.

MS. LARIN: Yes, Judge, this is our Motion to Dismiss this case under the Feres doctrine. I don't really -- we've really briefed this thoroughly. This is a classic Feres case.

THE COURT: It's really a sad case.

MS. LARIN: Very.

THE COURT: Counsel, anything you want to add, or anything? I mean --

MR. WULFMEIER: Well, I -- yes, I would like to ask this Court to overturn Feres. I know it's a difficult and unique situation. Feres has been around for fifty years, but that does not mean that it is anything but I believe to be judicial interpretation, judicial legislation. We have briefed it extensively. I think that while the Court apparently has its ruling --

THE COURT: No, I just have my notes. But I agree with you, this is one of those equitable cases. If I had equity jurisdiction, it screams, it screams and screams. It's not fair. There's is no question about that. Probably Ms. Larin would say the same thing, but she can't she's on the record.

MS. LARIN: I hope you're not asking --

THE COURT: No, I'm not asking, but I'm sure in your heart, but anybody who reads the facts in this particular case -- it's a horrible set of facts.

To be honest with you, one of my law clerks who really worked on it initially, the other is sitting right in front of me, she came to me and said oh, man, you know. And we looked at everything, I'll tell you. This is one we said there must be some case out there that will allow me. I'm not going to overrule the Supreme Court, I'll tell you right now. But we kept looking, and kept searching trying to find something, something that I could hang my hat on. I mean it's just so egregious, there's no question about that.

I mean, with so many cases that you could go on and on and on for fifty years, you know, you're absolutely right. And every time it gets interpreted by a Court of competent

jurisdiction on an appellate level it keeps slicing a little more, you know, away from the military person's rights to do something including when we finally get down to it, this such as this -- not sure as these things, but I mean there's several cases right on point --

MR. WULFMEIER: There are no rights at this point.

THE COURT: None.

MR. WULFMEIER: Even though it was under the Federal Tort Claims Act, specifically it indicates that there are rights.

THE COURT: But as I say for the last fifty years it's been interpreted and its keeps getting stronger --

MR. WULFMEIER: My point being that I believe that at the inception it was interpreted incorrectly.

THE COURT: It may have, but it's been re-interpreted so many times including by the United States Supreme Court that I would be very hard press to do it.

And I agree with you. As I say, we really looked at this case, and we sat down and -- Greta came in and said, there's got to be -- she just got out of law school. She said this is unfair, we've got to do something.

I tell you if there was any way to hang my hat on something, I would have. In fact, I event told Greta, I said maybe I'm going to put a little pressure on Ms. Larin to -- if we can find any loophole whatsoever, I'll put some pressure on her to go back to her client and maybe even settle this case or do something, just a little something,

some satisfaction. We couldn't find a loophole; otherwise, I would have had her at sidebar --

MR. WULFMEIER: You could start a new precedent today. Instead of Feres we could have Haase, your Honor, a new case.

THE COURT: I wish I could. As I say, I took an oath, and the oath was to follow the law.

Unfortunately the Supreme Court -- if it was, you know, another circuit or something like that, it would be real easy to do it.

I understand why they couldn't give him a stripe because he hadn't finished basic.

I'm not sure, did they pay his funeral expenses?

MS. LARIN: Judge, I don't know.

THE COURT: I saw something in there that indicated that they --

MS. LARIN: I would think that they paid it.

THE COURT: Did they pay it?

MR. WULFMEIER: Yes.

THE COURT: Oh, I thought I saw -- I knew they didn't give him a stripe but I thought there was something in there that said that they --

MR. WULFMEIER: There were so many other egregious acts.

THE COURT: I can't disagree with you.

There's not much I can do so I have to grant the Government's Motion.

MR. WULFMEIER: Thank you.

MS. LARIN: Thank you.

MS. LARIN: Shall I prepare an order?

THE COURT: No, we'll do it.

MS. LARIN: All right.

Thanks.

MR. WULFMEIER: Thanks.

THE COURT: Happy holidays to the both of you.

MR. WULFMEIER: Thank you, you too.

MS. LARIN: Thank you, Judge.

(Proceedings concluded.)

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DEFENDANT'S (sic) MOTION TO DISMISS
WEDNESDAY, DECEMBER 17TH 2003

CERTIFICATE

I, **JOAN L. MORGAN**, Official Court Reporter for the United States District Court for the Eastern District of Michigan, appointed pursuant to the provisions of Title 28, United State Code, Section 753, do hereby certify that the forgoing proceedings were had in the within entitled and number cause of the date hereinbefore set forth; (sic) and I do further certify that the foregoing transcript has been prepared by me or under my direction.

s/ Joan L. Morgan
JOAN L. MORAN,CSR
Official Court Reporter
Detroit, Michigan 48226

Date: Feb 20, 2004

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF MICHIGAN
SOUTHERN DISTRICT

RENEE THURLOW,

CLOSED 18 DEC 2003

Plaintiff,

vs.

Civil Action No.
03-CV-72865-DT
HON. BERNARD A.
FRIEDMAN

UNITED STATES OF AMERICA, et al.,

Defendants.

Filed '03 DEC 10 A11:17
U.S. DIST. COURT
CLERK EAST DIST.
MICH DETROIT-PSG

/

ORDER GRANTING DEFENDANTS' MOTION TO DISMISS FOR LACK OF JURISDICTION

On December 17, 2003, this matter came before the court on defendants' motion to dismiss plaintiff's complaint. A hearing was held and oral argument heard. For the reasons stated on the record,

IT IS ORDER that the complaint is dismissed based on the court's lack of jurisdiction.

"s/ Bernard A. Friedman"
UNITED STATES DISTRICT JUDGE

Dated: DEC 18 2003
Detroit, Michigan

No. 04-1095

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

RENEE THURLOW, Personal Representative of the Estate of Justin Haase, deceased,

Plaintiff-Appellant,

v.

UNITED STATES OF AMERICA; DEPARTMENT OF THE NAVY; SERGEANT WILLIAM R. BILENSKI; SERGEANT DWAYNE A. HARDWICK: HOSPTIALMAN SEAN O. AUDAIN; LIEUTENANT COMMANDER LLOYD D. WEDDINGTON,

Defendants-Appellees.

FILED DEC 13 2004
LEONARD GREEN, CLERK

O R D E R

NOT RECOMMENDED FOR FULL-TEXT PUBLICATION

Before: NELSON and BATCHELDER, Circuit Judges; COLLIER, District Judge.*

Renee Thurlow, a citizens of Michigan, appeals through counsel, on behalf of her son Justin Haase's estate, a district court order dismissing her complaint field pursuant to the Federal Tort Claims Act (FTCA), 28 U.S.C. § 2671 et seq., and 42 U.S.C. § 1983. Counsel did not respond to a

* The Honorable Curtis L. Collier, Untied States District Judge for the Eastern District of Tennessee, sitting by designation.

request to show cause why oral argument would be necessary in this case, and this panel unanimously agrees that oral argument is not needed. Fed. R. App. P. 43(a).

Mrs. Thurlow field this action to recover damages due to her son's death. According to the complaint, Justin Haase reported to Marine basic training in October 2001 at the age of eighteen. He was allergic to penicillin, and never received an alternate prophylactic course of antibiotics as required at his admission. Under the stress of basic training, including inadequate nutrition and rest, he developed a sinus infection which later developed into bacterial meningitis. His condition was not diagnosed or treated. Even after he was finally sent to a military hospital in December, the failure to properly diagnose and treat his condition continued, resulting in his untimely demise. Mrs. Thurlow sought relief under the FTCA § 1983.

Defendants moved to dismiss, arguing that the district court lacked jurisdiction under *Feres v. United States*, 340 U.S. 135 (1950), which prevents members of the military from recovering damages under the FTCA. Mrs. Thurlow field a response, and the district court heard the oral argument on the motion, which it reluctantly granted.

On appeal, Mrs. Thurlow argues that *Feres* was wrongly decided and should be overturned as unconstitutional. Alternatively, she argues that *Feres* should not be applied in this case because her son was not yet technically on active duty, not having completed basic training.

We review de novo a dismissal for lack of subject matter jurisdiction under Fed. R. Civ. P. 12(b)(1), *Skees v. Untied States*, 107 F.3d.421, 422-23 (6th Cir. 1997).

Such review shows that the district court correctly dismissed this complaint pursuant to existing law.

There *Feres* doctrine has been held to bar claims by service members and their families for medical malpractice. *Irvin v. United States*, 845 F.2d 126, 130 (6th Cir. 1998). Mr. Thurlow argues the Feres doctrine was wrongly decided and is unconstitutional, relying on the dissenting opinion in *United States v. Johnson*, 481 U.S. 681, 692-703 (1987). However, this court cannot overrule a Supreme Court precedent. Mackey v. United States, 226 F.3d 773, 777 (6th Cir. 2000).

Mrs. Thurlow's attempt to distinguish *Feres* also lacks merit because malpractice claims arising from pre-induction medical examinations have been held barred under the doctrine. *Schoemer v. United States*, 59 F.3d 26, 29-30 (5th Cir. 2000).

Finally, Mrs. Thurlow's attempt to circumvent the *Feres* holding by invoking § 1983 fails, because the federal government and its employees are not subject to suit under § 1983. *Ana Leon T. v. Fed. Reserve Bank*, 823 F.2d 928, 931 (6th Cir. 1987). Moreover, Mrs. Thurlow has not pursued her § 1983 claim on appeal.

For the above reasons, the district court order dismissing this complaint is affirmed.

ENTERED BY ORDER OF THE COURT

s/Leonard Green
Clerk